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SENATE

REPORT
100-31

FEDERAL TRADE COMMISSION ACT AMENDMENTS OF 1987

MARCH 31 (legislative day, MARCH 30, 1987).—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 677]

The Committee on Commerce, Science, and Transportation to which was referred the bill (S. 677) to amend the Federal Trade Commission act to provide authorization of appropriations, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of this legislation is to amend the Federal Trade Commission Act (15 U.S.C. 41 et seq.) to change the investigative, adjudicative, and rulemaking authority of the Federal Trade Commission (FTC), and to extend authorization of appropriations for the agency. This legislation would authorize to be appropriated $69,850,000 for fiscal year 1988, $70,850,000 for fiscal year 1989, and $71,850,000 for fiscal year 1990.

BACKGROUND AND NEEDS

Under the FTC Act, the FTC seeks to prevent anticompetitive conduct through its authority over "unfair methods of competition," and protect consumers through its "unfair or deceptive acts or practices" authority. The FTC may enforce this mandate through case-by-case adjudications under section 5 of the FTC Act (15 U.S.C. 45) and through industry-wide rulemaking.

In the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 (Public Law 93-637), Congress added a new section 18 to the FTC Act (15 U.S.C. 57a), providing the agency

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explicit authority and detailed new procedures for promulgating trade rules to prohibit "unfair or deceptive" practices. Largely as a result of dissatisfaction with the the FTC's exercise of its section 18 consumer protection rulemaking authority, Congress redirected some of the agency's rulemaking and added additional rulemaking procedures in the FTC Improvements Act of 1980 (Public Law 96-252).

The FTC Improvements Act expired at the end of fiscal year 1982, and the FTC has been without an authorization of appropriations since that time. During the 97th, 98th and 99th Congresses, the Committee monitored the FTC's compliance with the Improvements Act and, in connection with the agency's reauthorization, undertook a broader review of the FTC's exercise of its statutory mandate. This process resulted in the development of three authorization bills (S. 2499, S. 1714 and S. 1078) that were reported by the Committee in the 97th, 98th, and 99th Congresses, respectively. S. 2499 and S.1714 were not acted upon by the Senate prior to final adjustment. S. 1078 was acted upon by the Senate but failed in conference.

The Committee's review of the FTC's activities has continued in the development of S. 677, the Federal Trade Commission Act Amendments of 1987. This measure extends the authorization for the FTC and makes changes in authority and procedures that were adopted by the Committee in the authorization legislation reported in the 97th, 98th, and 99th Congresses.

UNFAIRNESS STANDARD

In particular, evaluation and study of the FTC's authority to prohibit "unfair . . . acts or practices" has continued since 1980, Enacted in 1938 as part of the Wheeler-Lea Amendment, the FTC's consumer "unfairness" authority was not a focus of enforcement action until 1964 when, as part of its Statement of Basis and Purpose for a proposed cigarette health warning rule, the FTC identified three factors to be considered in applying the prohibition against consumer unfairness: (1) Whether the practice injures consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous.[1] These three factors were later quoted with apparent approval by the Supreme Court in the 1972 case of Sperry & Hutchinson.[2]

In response to concerns that the FTC's unfairness authority was poorly defined by these principles and potentially unbounded, the Consumer Subcommittee requested public comment on the scope of the FTC's unfairness authority,[3] and wrote to the FTC to request more specific views.

In its December 17, 1980 letter in response, the FTC abandoned one portion of its 1964 unfairness criteria and, summarizing its past use of unfairness in decided cases and rules, articulated guiding principles for future application of its unfairness mandate.

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[1] Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[2] *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 223, 244-45 n. 5 (1972).

[3] The public comments received have been printed by the Committee. *See* Senate Committee on Commerce, Science, and Transportation, 96th Cong., 2d Sess., Unfairness: Views on Unfair Acts and Practices in Violation of the Federal Trade Commission Act (Comm. Print 1980).

Under the FTC's policy statement, unjustified consumer injury is the primary focus of the FTC Act, and the most important of the 1964 criteria. Not every consumer injury is legally "unfair", however; to justify a finding of unfairness, the injury must satisfy three tests:

> It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[4]

With regard to the second of the 1964 criteria, the FTC observed that while "established public policy" may sometimes independently support FTC action, it is used most frequently by the FTC as a means of providing additional evidence of consumer injury. Such a policy must be "clear and well-established" and:

> Declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from a general sense of rational values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court.[5]

The FTC explicitly abandoned future use of the third part of the 1964 criteria relating to "unethical and unscrupulous" conduct.

On March 5, 1982, the FTC wrote again to the Committee,[6] reaffirming the principles of its December 17, 1980 policy statement and recommending that they be codified as a statutory definition of unfairness. Section 9 of S. 677 contains such a new definition of unfairness.

COMMERCIAL ADVERTISING

In addition to problems with the scope of the FTC's unfairness authority, the Committee has been concerned with the use of unfairness to regulate commercial advertising. Traditionally, both before and after the Wheeler-Lee Amendment of 1938, the FTC has regulated commercial advertising only to prevent deception. In its staff report on "Television Advertising to Children" (February 1978), however, the FTC contemplated regulation of some children's advertising, not because it deceived children, but because it was "unfair."

Concerned with the potentially unbounded regulation of nondeceptive commercial advertising on the basis of unfairness, Congress addressed this issue in two ways in section 11 of the FTC Improvements Act of 1980. First, the FTC's authority to issue a children's advertising rule based on unfairness was removed. (After conducting an evaluation of the basis for a children's advertising rule on a deception theory, the FTC terminated the children's advertising proceeding in 1981.)

Second, Congress placed a moratorium on the FTC's use of unfairness in new section 18 rulemakings designed to regulate com-

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[4] December 17, 1980 letter from FTC to Senators Ford and Danforth at page 5. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97-108).

[5] December 17, 1980 letter from FTC to Senators Ford and Danforth, *supra* note 4, at page 12.

[6] March 5, 1982 letter from FTC to Senators Packwood and Kasten. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97-108).

mercial advertising. The moratorium on new rulemaking permitted the FTC to continue to regulate commercial advertising on the basis of deception, and the FTC retained the authority to rely on unfairness in individual cases against advertisers under section 5 of the FTC Act. Because the unfairness standard for the regulation of commercial advertising practices goes beyond the elimination of misleading or deceptive commercial speech, it presents a constitutional conflict with first amendment protections for free speech. Section 11 of S. 667, which makes permanent this moratorium on new section 18 rulemakings to regulate advertising based on unfairness, is motivated by the Committee's continued concern with the potential for abuse in this area.[7]

OVERVIEW OF ENFORCEMENT

The FTC's enforcement efforts have come under increasing criticism, and numerious witnesses testified at the Committee's authorization hearing that the level of enforcement activity has decreased. This perception of diminished enforcement has led to suggestions for change. Among the proposals for change is one to enhance the authority of State attorneys general to enforce the FTC Act and another to enhance the resource commitment to the FTC's regional offices.

The FTC's enforcement efforts have prompted some State law enforcement officials to undertake additional investigations and prosecutions. As fraudulent schemes grow more complex and extensive, however, they begin to take on a national flavor. A conflict may arise between the geographic boundaries which limit the jurisdiction of State law enforcement officials and the boundaries of such schemes.

Consequently, State attorneys general may find themselves pursuing the same malefactors and conducting parallel investigations. Given this situation, proposals have been advanced to increase the effectiveness of those efforts by extending FTC Act enforcement authority to State attorneys general and allowing a single State to obtain and enforce on a nationwide basis an order obtained in Federal court pursuant to the FTC Act. The Committee intends to examine this proposal in future hearings.

An additional proposal, to strengthen the FTC's commitment to its regional offices, is included in S. 677. Because regional activity is so indispensable to FTC enforcement, it is important to protect this aspect of the FTC's budget. For that reason, S. 677 would redirect funds from other FTC activity that is not directly enforcement-related, such as the Economic Activities Mission and the Office of Policy Development, for use by the regions.

LEGISLATIVE HISTORY

S. 677 was introduced on March 6, 1987, by Senator Gore, with Senators Hollings, Danforth, Ford, Breaux, McCain and Kasten as

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[7] This restriction on section 18 rulemaking authority does not impede the Commission's ability to address new legal questions pertaining to commercial advertising in individual cases under section 5. As discussed in the section-by-section analysis under section 6, the U.S. Court of Appeals for the Ninth Circuit was incorrect to suggest that the Commission cannot use its adjudicative authority to address novel legal questions.

cosponsors, following hearings on February 4 and 5, 1987. On March 10, 1987, the Committee without objection ordered S. 677 to be reported, with amendments.

In the 99th Congress, on May 6, 1985, Senator Kasten introduced S. 1078, the predecessor to the present authorization legislation, following a hearing on April 24, 1985 (S. Hrg. 99-151). S. 1078 was ordered reported by the Committee on May 9, 1985 (S. 99-81). The Senate passed the legislation on July 26, 1985 but issues in the legislation were not resolved in the Senate and House Conference.

In the 98th Congress, on July 29, 1983, Senator Packwood introduced S. 1714, authorization legislation. General hearings on the reauthorization of the FTC were conducted before the Committee on March 16, 17, and 18, 1983 (Serial No. 98-19), and on March 18 and 19, 1982 (Serial No. 97-108). S. 1714 was ordered reported by the Committee on August 2, 1983 (S. Rept. 98-364). The 98th Congress adjourned, however, without Senate action on S. 1714.

In the 97th Congress, more focused hearings were conducted before the Committee on July 15 and 17, 1981, regarding the FTC's jurisdiction over State-regulated professional activities (Serial No. 97-59), and on July 22, 1982, regarding the FTC's authority to ban deceptive advertising (Serial No. 97-134). A bill, S. 2499, was reported by the Committee on May 28, 1982 (S. Rept. 97-451), but Congress adjourned without Senate action on this measure.

Summary of Major Provisions

SECTION 2.—UNFAIR METHODS OF COMPETITION

This section contains a new statutory limitation of the FTC's authority with respect to certain regulatory functions of the States. It adds a new subsection to section 5 of the FTC Act, which provides that the "State action" antitrust immunity developed by the courts in litigation under the Sherman Act would be applied also to the FTC's "unfair methods of competition" cases.

SECTION 3.—AGRICULTURAL COOPERATIVES

This section would add a new section 24 to the FTC Act to make permanent temporary prohibitions of FTC studies, investigations or prosecutions of agricultural cooperatives for conduct failing within the limited antitrust immunity provided by the Capper-Volstead Act. FTC studies or investigations of marketing orders are also prohibited.

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal the FTC's authority under section 18(h) of the FTC Act to compensate public participants in FTC rulemaking proceedings.

SECTION 5.—KNOWING VIOLATIONS OF ORDERS

This section would amend section 5(m)(1)(B) of the FTC Act (which gives the FTC the authority to go to Federal court to seek civil penalties against one company for a knowing violation of the holding of a prior case against a different company) to permit the defendant to challenge in court the legal basis for the FTC's prior

order, thereby codifying the U.S. District Court decision in *United States* v. *Braswell,* Inc., 1981-82 Trade Cas. (CCH) 64,325 (N.D. Ga. 1981).

SECTION 6.—PREVALENCE OF UNLAWFUL ACTS OR PRACTICES

This section would amend section 18(b) of the FTC Act to provide that the FTC may issue a notice of proposed rulemaking only where it has reason to believe that the challenged conduct is prevalent in the industry.

SECTION 7.—EFFECTIVE DATE OF ORDERS

This section would amend section 5(g) of the FTC Act to end the present requirement for an automatic stay of FTC cease-and-desist orders pending appeal, and, with some exceptions, provide instead that FTC orders may be stayed by the FTC itself or by the courts (within their discretion) during the appeal process. This section would conform FTC practices to that of other Federal agencies.

SECTION 8.—CIVIL INVESTIGATIVE DEMANDS

This section would extend the "civil investigative demand" document procedures contained in section 20 of the FTC Act, which now apply to FTC investigations under its consumer protection authority, to antitrust investigations conducted by the FTC. Principally, this amendment would have the effect of requiring that FTC antitrust investigations be conducted pursuant to section 20, just as consumer protection investigations already are conducted.

SECTION 9.—DEFINITION OF UNFAIR ACTS OR PRACTICES

This section would add a new subsection to section 5 of the FTC Act limiting unlawful "unfair acts or practices" to acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This definition would circumscribe the FTC's consumer unfairness authority for both rulemaking and case-by-case adjudications.

SECTION 10.—CREDIT UNIONS

This section would amend sections 5, 6, and 18 of the FTC Act to exempt Federal credit unions from FTC jurisdiction on the same basis that banks and savings and loan institutions are now exempt. Federal credit unions are regulated by the National Credit Union Administration.

SECTION 11.—COMMERCIAL ADVERTISING

This section would amend section 18 of the FTC Act to make permanent the temporary provision prohibiting the FTC from initiating any new rulemaking proceeding prohibiting or otherwise regulating any commercial advertising on the basis that such advertising is an unfair act or practice.

SECTION 12.—REPORT

This section would require the FTC to report semi-annually to the Senate Commerce, Science, and Transporation Committee and the House Energy and Commerce Committee on FTC enforcement activities in the area of resale price maintenance.

SECTION 13.—CONGRESSIONAL REVIEW OF RULES

This section would provide for a 90-day congressional review and, when appropriate, disapproval of FTC rules through the enactment of a joint resolution.

SECTION 14.—REPORT ON PREDATORY PRICING PRACTICES

This section would require the FTC to report semi-annually to the Senate Commerce, Science, and Transportation Committee and the House Energy and Commerce Committee on FTC enforcement activities in the area of predatory pricing.

SECTION 15.—INTERVENTION BY FTC

This section would prohibit funding of FTC intervention in the proceeding of any Federal or State agency unless the FTC advises the Senate Commerce, Science, and Transportation Committee and the House Energy and Commerce Committee.

SECTION 16.—NATIVE AMERICAN ARTS AND CRAFTS

This section requires the FTC to investigate the marketing of imitation Native American arts, crafts, and jewelry and report to the Congress.

SECTION 17.—REGIONAL OFFICES

This section provides that $858,000 must be redirected to the FTC's regional offices. At least $500,000 must come from the Economic Activities Mission and the Office of Policy Development. The remainder cannot be redirected from amounts made available for law enforcement activities. For fiscal years 1988, 1989, and 1990, regional offices must be maintained at the locations, and at not less than the proposed budget submission to Congress, for the regional offices for fiscal year 1988. This is in addition to the $858,000 provided for in this legislation.

SECTION 18.—AUTHORIZATION OF APPROPRIATIONS

This section would reauthorize the FTC for three years at funding levels of $69,850,000 for fiscal year 1988; $70,850,000 for fiscal year 1989; and $71,850,000 for fiscal year 1990. For fiscal years 1989 and 1990, such additional amounts are also authorized as may be necessary for increases in salary, pay, and other employee benefits authorized by law.

SECTION 19.—EFFECTIVE DATE

Unless otherwise provided, this act will be effective upon enactment.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 17, 1987.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 677, the Federal Trade Commission Act Amendments of 1986.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 677.
2. Bill title: Federal Trade Commission Act Amendments of 1987.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, March 10, 1987.
4. Bill purpose: S. 677 authorizes the appropriation of up to $69.85 million in fiscal year 1988, $70.85 million in fiscal year 1989, and $71.85 million in fiscal year 1990 to carry out the programs of the Federal Trade Commission (FTC), plus such sums as may be necessary in fiscal year 1989 and 1990 for increases in salary, pay, and other employee benefits as authorized by law. In addition, the bill makes a number of changes in FTC policies and procedures.

Fiscal year 1987 appropriations for the FTC are $65 million. The President is requesting $69.85 million for the FTC in 1988, the same amount as in the bill.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1988	1989	1990	1991	1992
Authorization level:					
Specified (Function 370)	69.9	70.9	71.9		
Estimated (Function 920)		2.5	2.8		
Total	69.9	73.3	74.6		
Estimated outlays	63.9	73.0	74.5	6.3	

Including outlays from prior years' budget authority, total outlays for the FTC in 1988 would be approximately $69.4 million.

The costs of this bill fall within budget function 370.

Basis of Estimate: For the purposes of this estimate, it was assumed that the amounts authorized in the bill would be appropriated prior to the beginning of each fiscal year. The increases for salary, pay, and other employee benefits required by law in 1989 and 1990 are estimated consistent with the CBO baseline projections. Outlays reflect historical spending patterns for the ongoing activities of the FTC.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Carol Cohen.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation.

NUMBER OF PERSONS COVERED

This legislation provides an authorization of appropriations for fiscal years 1988, 1989, and 1990 to enable the FTC to carry out its functions under the Acts that it must enforce. The number of persons covered should be consistent with current levels.

ECONOMIC IMPACT

This legislation authorizes appropriations in the amounts of $69,850,000 for fiscal year 1988, $70,850,000 for fiscal year 1989 and $71,850,000 for fiscal year 1990, for the FTC to carry out its functions. These funding levels are not expected to have an inflationary impact on the Nation's economy

The legislation is expected to reduce the burdens of FTC regulation, principally by limiting the FTC's jurisdiction over certain classes of persons, activities, and entities, and by circumscribing certain types of authority. Sections 2 and 3 limit the FTC's "unfair methods of competition" authority over State-regulated activities and agricultural cooperatives, respectively. Section 10 would exclude credit unions from FTC jurisdiction to the same extent that banks and savings and loan institutions are exempt. Any adverse economic impact of FTC regulation is likely to be reduced by clarifications of FTC authority contained in other sections, including sections 6, 9, and 11.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individuals affected.

PAPERWORK

This legislation is not likely to affect substantially or increase paperwork requirements.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section contains the short title of the legislation, the "Federal Trade Commission Act Amendments of 1987".

SECTION 2.—UNFAIR METHODS OF COMPETITION

This section contains a new statutory limitation on the FTC's "unfair method of competition" authority. It would amend section 5 of the FTC Act to add a new subsection providing that the FTC shall not have any authority to find a method of competition to be an unfair method of competition if, in any action under the Sherman Act,[8] such method of competition would be held to constitute "State action."

Beginning with the Supreme Court's 1943 decision in *Parker* v. *Brown*,[9] courts have held anticompetitive conduct to be exempt from antitrust challenge under the Sherman Act if, first, the conduct was undertaken pursuant to clearly articulated and affirmatively expressed State policy to displace competition and second, this conduct was actively supervised by the State.[10] The purpose of this section is to eliminate any uncertainty as to the applicability of the judicially-developed "State action" immunity to the FTC's "unfair methods of competition" authority, just as this immunity is applicable presently to actions under the Sherman Act.

In the past, the FTC has recognized that adjudications pursuant to its "unfair methods of competition" authority are subject to the "State action" doctrine, which rests on principles of federalism and State sovereignty.[11] The Committee intends that as courts continue to refine and develop the "State action" immunity, these refinements and changes will apply to such future FTC adjudications, as well.

SECTION 3.—AGRICULTURAL COOPERATIVES

This section would add a new section 24 to the FTC Act, making permanent section 20 of the FTC Improvements Act of 1980, which prohibited the FTC temporarily from any study or investigation of agricultural marketing orders, or any study, investigation or prosecution of agricultural cooperatives for conduct which the Capper-Volstead Act exempts from the antitrust laws. As stated in the Conference Report for Section 20 of the 1980 Act, the intent of the section is "to ratify the spirit and intent of the Capper-Volstead Act."

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[8] 15 U.S.C. 1-7.

[9] 317 U.S. 341 (1943).

[10] *See, e.g., Goldfarb* v. *Virginia State Bar, 421 U.S. 773 (1975); Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976; *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978); *California Retail Liquor Dealers Ass'n.* v. *Medical Aluminum, Inc.*, 445 U.S. 97 (1980); *Town of Hallie* v. *City of Eau Claire, 105 S. Ct. 1713 (1985); Southern Motor Carriers Rate Conference* v. *United States*, 105 S. Ct. 1721 (1985). (In *Southern Motor Carriers*, the Supreme Court recently held that the collective ratemaking activities of motor common carriers in certain States, although not compelled by the States, were immune from Federal antitrust liability, because the anticompetitive conduct was authorized pursuant to clearly articulated State policies and was the subject of active supervision by the States.)

[11] *See, e.g., Massachusetts Furniture and Piano Movers*, 102 F.T.C. 1176 (1983), *appeal filed sub nom. Massachusetts Furniture and Piano Movers* v. *FTC*, No. 83-1892 (1st Cir. filed Dec. 6, 1983).

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal section 18(h) of the FTC Act, the FTC's authority to provide compensation for reasonable attorney's fees, expert witness fees, and other costs to participantts in section 18 trade regulation rulemakings. No funds have been appropriated for this program since fiscal year 1980.

SECTION 5.—KNOWING VIOLATIONS OF CEASE-AND-DESIST ORDERS

The purpose of this section is to clarify the scope of the FTC's existing authority under section 5(m)(1)B) of the FTC Act to obtain civil penalties against persons who violate the holdings of prior cases. Section 5(m)(1)(B) provides that the FTC may obtain a civil penalty against a person who violates the holding of a prior case—even though that person was not a party—if the FTC can prove that the violator had actual knowledge that the practice was unfair or deceptive and unlawful.

Subsection (a) of this section would amend section 5(m)(1)(B) to make clear that such nonrespondent liability may not be imposed where such person has violated the standards of an outstanding consent agreement. The Committee intends that a case settled by consent agreement would not qualify as a predicate for a section 5(m)(1)(B) proceeding, because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding. By contrast, the FTC issues a final cease-and-desist order only after all factual and legal issues have been fully adjudicated before an administrative law judge, subject to review by the FTC. Thus, it is the FTC's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements, and this subsection codifies this practice.

Subsection (b) would amend section 5(m)(1)((B) to make clear that where FTC seeks a civil penalty based on a violation of a holding in a case to which the defendant was not a party, the defendant may challenge in the penalty suit the validity of the FTC's legal determination of what constitutes an unfair or deceptive practice under section 5(a)(1). The court would examine the FTC's interpretation under the appropriate standard of review.[12] The FTC has already conceded in litigation under section 5(m)(1)(B), and one court has so held, that defendants in section 5(m)(1)B) cases must be given this right.[13] Because subsection (b) is intended to codify the FTC's current policy, as developed in the *Braswell* litigation cited previously, the Committee intends that subsection (b) apply to cases currently in litigation as well as cases initiated under section 5(m)(1)(B) following the enactment of this legislation.

SECTION 6.—PREVALENCE OF UNLAWFUL ACTS OR PRACTICES

This section would amend section 18(b) of the FTC Act to reemphasize the importance of prevalence as a basis for initiating a trade regulation rulemaking. Although the FTC has generally exercised appropriated discretion in initiating rulemaking proceedings,

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[12] *See, e.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

[13] *United States* v. *Braswell, Inc.* 1981-82 Trade Cas (CCH) 64,325 (N.D. Ga. 1981), *aff'd*, No. 81-9666 (11th Cir. March 3, 1982).

the Committee believes a statutory standard to guide the exercise of this discretion is desirable.

The section provides that the FTC may issue a notice of proposed rulemaking only if it has "reason to believe" that unfair or deceptive acts or practices are "prevalent." Prevalence exists only if the FTC has issued cease-and-desist order regarding acts and practices that are addressed by the rule, or if other information available to the FTC indicates a "pattern" of unlawful conduct. The "reason to believe" standard is intended to bar any judicial review.

The FTC should not initiate a trade regulation rulemaking where only isolated and insignificant violations have occured. Rulemaking is permissible only where there have been several cease-and-desist orders or other evidence of a pattern of unlawful conduct. The FTC may, of course, consider the extent to which unlawful conduct causes significant economic injury in deciding whether to commence a rulemaking proceeding. It is the combined impact of the injury and the violations found which should be considered.

Where unlawful acts or practices are not "prevalent" within the meaning of this section, the FTC may proceed using its section 5 adjudicative authority, even if the FTC is thereby creating new law. The U.S. Court of Appeals for the Ninth Circuit was plainly incorrect to suggest recently that the FTC "exceed(s) its authority by proceeding to create new law by adjudication rather than rulemaking" and acts improperly by rendering a novel interpretation of law in an adjudication where the "rule of the case . . . will have general application." [14] Because this suggestion is inconsistent with congressional intent in conferring adjudicative authority upon the FTC, the Committee does not believe it poses any barrier to the FTC's use of adjudication to address novel legal questions or any barrier to effective application of this section.

SECTION 7.—EFFECTIVE DATE OF CEASE-AND-DESIST ORDERS

This section would amend section 5(g) of the FTC Act to make most FTC cease-and-desist orders effective 60 days after service unless stayed by the FTC or a court.

Currently, FTC cease-and-desist orders become final within 60 days only if no petition for review has been filed. Otherwise, the effective date of the entire order must await the decision of the Court of Appeals or the Supreme Court, as the case may be. Under present law, unless the Court of Appeals grants extraordinary ancillary relief, a respondent may continue to engage in conduct which the FTC has determined unlawful until ultimate disposition of a petition for review, which often takes years.[15] Thus, in some cases, respondents are encouraged to file petitions for review, based on frivolous or other unmeritorious claims, largely for the purpose or effect of delay. This section would reduce the incentive to file petitions for review simply for dilatory purposes.

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[14] *Ford Motor Co.*, v. *FTC*, 673 F.2d 1008 at 1011 (9th Cir.) *cert. denied*, 459 U.S. 999 (1982). *See* K. Davis, Administrative Law Treatise, 1982 Supplement, section 7.25 at 182–83 and cases cited.

[15] Chairman Miller testified that: "Of all cases finally decided by a court of appeals during the four-year period from January 1, 1977, over two-thirds of the Commission's orders were substantially affirmed. Yet the delay in the effectiveness of these affirmed orders ranged from 18 to 48 months and averaged approximately 29 months." Prepared Statement of James C. Miller III, March 18, 1982, at 6.

Moreover, as many challenges to FTC decisions relate only to certain provisions of a cease-and-desist order, there is no compelling reason to delay the effective date of the order in its entirety in each case, as at present.

The Committee believes that the proposed amendment offers sufficient protection to those parties with legitimate reasons for noncompliance by permitting them to obtain a stay of the order from the FTC in the first instance, the U.S. Court of Appeals before which a petition to review is pending, or the Supreme Court if a petition for certiorari has been filed. To insure against delay in action upon applications for a stay, this section would permit the Court of Appeals to consider a stay request if the FTC has not acted within 30 days of the receipt of such an application.

The procedure contemplated by this section is the norm for other Federal agencies and also reflects the practice in the Federal court system. Similar provisions are found in the statutes of the Environmental Protection Agency, the Federal Communications Commission, and the Federal Energy Administration, to name a few.[16]

Because of the substantial impact on business operations of a divestiture order, this section would retain the current mandatory stay requirements as to such orders. This section also retains the current definition of finality with respect to the initiation of consumer redress actions and actions arising from knowing violations of the holding of FTC decisions by nonparties.

SECTION 8.—CIVIL INVESTIGATIVE DEMANDS

This section would amend section 20 of the FTC Act to require that all FTC law enforcement investigations be conducted pursuant to civil investigative demand ("CID") procedures set out in that section. Under current law, the CID procedures are limited to the FTC's consumer protection investigations. Because these procedures have worked well at the FTC's and because the Department of Justice has successfully used CID's in its antitrust investigations, the Committee believes that the CID procedures should apply to the FTC's antitrust investigations as well. The Committee intends no change in the scope or usage of CID's as discussed in the report of the provision enacted as section 20.[17] The Committee does not intend this legislation to apply to subpoenas outstanding at the time this legislation becomes effective or to investigative resolutions issued before the effective date.

SECTION 9.—DEFINITION OF UNFAIR ACTS OR PRACTICES

This section would amend section 5 of the FTC Act to add a new subsection limiting the FTC's authority over "unfair acts or practices" to acts or practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits

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[16] *See*, 7 U.S.C. 135b(d) and 42 U.S.C. 4915(c) (EPA); 47 U.S.C. 402 (FCC); 29 U.S.C. 160(g)(NLRB); and 15 U.S.C. 77i(b) (SEC).

[17] *See* S. Rept. 96-500, 96th Cong., 1st Sess. at 23-36 (1979). The Commission would continue to use subpoena authority under section 9 of the FTC Act in adjudicatory proceedings and in investigations to determine whether an outstanding order to cease-and-desist has been violated.

to consumers or competition. This limitation would apply both to adjudications under section 5 and rulemakings under section 18.

In accordance with the FTC's recommendation, this section is intended to codify, as a statutory limitation on unfair acts or practices, the principles of the FTC's December 17, 1980 policy statement on unfairness as reaffirmed in a March 5, 1982 letter. Since the FTC's policy statement itself is based on the FTC's decided cases and rules, this section codifies existing law. The incorporation of these criteria should enable the FTC to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority, and consistent with the approach the FTC and the courts have taken in the past. The Committee believes this codification is necessary in order to provide the FTC, its staff, regulated business, and reviewing courts greater guidance on the meaning of unfairness and to prevent a future FTC from abandoning the principles of the December 17, 1980 and March 5, 1982 letters.

Consumer injury may be "substantial" under this section if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. In accordance with the FTC's December 17, 1980 letter, substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks. Emotional impact and more subjective types of harm alone are not intended to make an injury unfair.

In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.

The Committee knows that State attorneys general have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law.

Since the mid-1960's, virtually every State has enacted statutes prohibiting deceptive practices, while at least 30 States also prohibit unfair practices. These State consumer protection acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts, including unconscionable pricing practices, high pressure sales tactics, uninhabitable living conditions in leased premises, and abusive debt collection practices.

The Committee intends no effect on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the FTC's past activities. The Committee's action

should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the FTC's future construction of these criteria limits in any way the range of State decisionmaking. Sound principles of federalism limit the impact of this section to the FTC only.

SECTION 10.—CREDIT UNIONS

This section would amend portions of sections 5, 6, and 18 of the FTC Act to exempt Federal credit unions from FTC jurisdiction in the same manner that banks and savings and loan institutions are presently exempted.

When the FTC was created in 1914, banks were specifically exempted from the regulatory and investigative authorities of the newly created FTC, because, as depository institutions, they were subject to close Federal regulatory control by the Federal Reserve Board. Savings and loan institutions under the authority of the Federal Home Loan Bank Board were granted a parallel exemption in 1979, by enactment of Public Law 96-37.

Federal credit unions are extensively regulated pursuant to the Federal Credit Union Act (12 U.S.C. 1751-1795) by the National Credit Union Administration (NCUA), an independent Federal agency with primary responsibility for the chartering, supervision, regulation, and examination of credit unions chartered by the Federal Government. The regulatory presence with respect to Federal credit unions clearly parallels the presence with respect to banks and savings and loan institutions, and the Committee believes that there is no reason to treat Federal credit unions differently.

Although the FTC has never brought an enforcement action against a credit union for violations of the FTC Act, it does have two rules that would directly affect credit union lending practices. Thus, this section would end the potential for the unnecessary, costly and duplicative Government regulation that follows from having both the FTC and the NCUA regulate Federal credit unions by providing the same exemption from FTC jurisdiction now provided to banks and savings and loan institutions.

Under the terms of the exemptions provided to banks and savings and loan institutions, these institutions are excluded from the FTC's enforcement and investigative authority under sections 5 and 6 of the FTC Act, but section 18(f) provides that whenever the FTC promulgates a trade regulation rule under section 18, the Federal Reserve Board and the Federal Home Loan Bank Board must promulgate a substantially similar rule respecting banks and savings and loans unless these agencies determine that the challenged acts or practices are not unfair or deceptive in the context of these institutions. With the enactment of this Act, the NCUA will be required to follow similar procedures.

Under section 18(f)(1), such rule must be promulgated within 60 days after the FTC's rule takes effect. This section also gives the Federal Reserve Board, the Federal Home Loan Bank Board and now the NCUA the power to issue additional regulations defining with specificity other unfair or deceptive acts or practices and containing requirements for the purposes of preventing such acts or

practices. The Committee intends that under these provisions the NCUA will promulgate a rule substantially similar to the FTC's Credit Practices Rule (16 C.F.R. 444, effective March 1, 1985) within 6 months from the date of enactment of this Act, unless it finds that such acts or practices by Federal credit unions are not unfair or deceptive and publishes such findings in the Federal Register.

The Committee intends that the NCUA be authorized to use its full authority under the Federal Credit Union Act to remedy suspected antitrust and consumer protection violations by Federal credit unions. Section 102 of the Federal Credit Union Act (12 U.S.C. 1766) provides the NCUA general rulemaking power, including the power through rulemaking to govern mergers among Federal credit unions. Section 206 (12 U.S.C. 1786) provides the NCUA the power to issue cease-and-desist orders where, among other things, a credit union is engaged in an "unsafe or unsound practice" or is violating or is about to violate a "law, rule, or regulation."

The NCUA would have ample authority under section 120 and under the amendments made by this section to promulgate rules respecting unfair or deceptive acts or practices pursuant to section 18(f) of the FTC Act. As the amendments made by this section make clear, the penalty provisions of sections 120 and 206 of the Federal Credit Union Act would apply fully to violations of such rules. In addition, the Committee believes that the NCUA would also have the authority under section 120 to order credit unions to cease from otherwise violating the FTC Act or any other antitrust of consumer protection "law, rule or regulation."[18]

Writing in support of the section, NCUA Chairman Roger W. Jepsen confirmed that:

> The National Credit Union Administration is prepared to ensure proper compliance in such matters. Our authority under Section 120 . . and Section 206 . . . is sufficient to protect the interests of Federal credit union members.[19]

In addition, the Committee notes that the Department of Justice would retain antitrust authority over credit unions, just as it has over banks and savings and loan institutions.

SECTION 11.—COMMERCIAL ADVERTISING

This section would amend section 18 of the FTC Act to provide that the FTC shall have no authority under that section to initiate any new rulemaking proceeding which is intended to or may result in the promulgation of any rule by the FTC which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the FTC that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

Under this section, the FTC would continue to have the authority to rely on unfairness to prohibit or regulate commercial advertising in individual case adjudications under section 5 of the FTC

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[18] *Cf., Reich* v. *Webb,* 336 F.2d 153 (9th Cir. 1964), *cert. denied,* 380 U.S. 915 (1965); *Otero Savings and Loan Assoc.* v. *Federal Home Loan Bank Board,* 665 F.2d (10th Cir. 1981).

[19] January 29, 1987 letter from NCUA to Senator Gore. This letter is printed in the record of the Consumer Subcommittee's February 4 and 5, 1987 hearings.

Act. The FTC would also continue to have the authority to prohibit or regulate commercial advertising based upon a deception theory, through both section 5 case adjudications and section 18 rulemakings. This section would thus make permanent the similar limitation on new section 18 rulemakings enacted on a temporary basis in section 11 of the FTC Improvements Act of 1980.

For purposes of this section, the terms "commercial advertising" denotes promotional messages that appear in broadcast or print media, including promotional mailings. It is not intended to cover oral representations, representations in credit contracts, debt collection notices, and the like, which would remain subject to the FTC's unfairness jurisdiction.[20]

Further, this section is intended to apply to regulation by the FTC of the content of commercial advertising, and not to regulation of practices that may somehow pertain to such advertising but are not themselves advertising. For example, this section would not affect the FTC's authority to regulate practices that ban or restrain commercial advertising, or to regulate "practices" that are unfair; e.g., placing sample razor blades in a newspaper insert.

The Committee believes that the limitation contained in this section is warranted because the constitutional protection accorded to non-deceptive commercial speech is threatened by the broad grant of "unfairness" jurisdiction contained in section 18 of the FTC Act. The fact that "purely" commercial speech is within the protection of the First Amendment is no longer subject to doubt.[21] In recent Supreme Court decisions defining the limits of governmental power to regulate commercial speech, the Court has made it clear that government retains the power to proscribe misleading or deceptive advertising.

The "unfairness" standard in section 18 has no proper place in the regulation of commercial speech as the standard is too vague to avoid an unacceptable risk of abridging first amendment principles of free speech, and does not take into account the mandate that the least restrictive form of regulation must be used consistent with meeting the substantial governmental interest involved.[22] The Committee is particularly concerned that the use of unfairness authority when applied on an industry-wide basis in rulemaking proceedings is too broad. By contrast, when the FTC proceeds using its section 5 adjudicative authority, the FTC's remedial order may be better tailored to the facts of the specific case before the FTC. Moreover, the FTC's use of the unfairness standard has survived litigation in cases dealing with unfair methods of competition or unfair acts or practices, not advertising.[23] Because the unfairness standard in section 18 goes beyond the elimination of misleading or deceptive commercial speech, it raises an unacceptable potential for conflict with First Amendment principles.

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[20] *See, e.g., Horizon Corp.* (Dkt. No. 9017, May 15, 1981); *Spiegel, Inc.* v. *FTC*, 540 F.2d 287 (7th Cir. 1976); General Motors Corp., 95 F.T.C. 825 (1980).

[21] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S., 748, 762 (1976).

[22] *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).

[23] *See, e.g., FTC* v. *R. F. Keppel & Bros.*, 291 U.S. 304 (1934); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

Moreover, the Committee is persuaded that the FTC's existing authority to prohibit unfair or deceptive acts or practices under section 5 and deceptive practices under section 18 is sufficient to permit the FTC to police abusive advertising practices. The Committee believes that illegal advertising practices prohibited by the FTC in the past could be reached by this authority. Consequently, the Committee believes this amendment does not in any way undercut appropriate FTC law enforcement but only protects against unwarranted and constitutionally sensitive actions against commercial advertising in the future.

While it appears that the FTC has, in the past, attacked certain abusive advertising practices as "unfair," it has also attacked these same practices as "deceptive," and this section should, therefore, not result in legalization of such practices in the future. One example is the FTC's advertising substantiation program. Unsubstantiated advertising was originally addressed as an "unfair" practice,[24] but subsequent FTC decisions have firmly established that dissemination of unsubstantial advertisements is a deceptive practice, as well.[25] Recently, the FTC has reiterated that "deception" may serve as a basis for its ad substantiation doctrine in its Ad Substantiation Policy Statement.[26]

It should be noted that in advocating enactment of related legislation in testimony before the Committee, representatives of the major advertising trade associations said that they did not intend "to affect in any way the FTC's power to require that positive claims made in advertisements must be substantiated." This section is not intended to impair in any way the FTC's advertising substantiation program.[27]

A second example relates to commercial advertising depicting unsafe or unlawful activity.[28] While such cases have been addressed in the past as both "unfair" and "deceptive" practices, representatives of the advertising industry testified that they "could clearly be brought under a deception theory." The Committee believes that, to the extent such advertisements are deceptive because they fail to reveal material facts, the advertisements may be deceptive.

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[24] *See, e.g., Pfizer, Inc.*, 81 F.T.C. 23 (1972).

[25] *E.g., National Comm'n on Egg Nutrition, 88 FTC 89, 191 (1976), aff'd* 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Sears, Roebuck & Co.*, 95 FTC 406, 520-21 (1980), *aff'd*, 676 F. 2d 385 (9th Cir. 1982).

[26] 49 Fed. Reg. 309-399 (Aug. 7, 1984).

[27] In approving the ad substantiation program the Committee intends to incorporate the general scope of this program as it has been endorsed by the Commission and the courts. We recognize that its application may require further elaboration by the Commission and the courts. The Committee has not reviewed, and takes no position on the FTC staff position in various FTC ad substantation cases which are currently pending.

[28] *See e.g., Uncle Ben's Inc.*, 89 FTC 131 (1977) (ad portrayed children cooking at a stove); *Mego Industries, Inc.*, 92 FTC 186 (1978) (ad portrayed child using electric appliance near sink of water); *General Foods Corp.*, 86 FTC 831 (1975) (ad portrayed Euell Gibbons eating wild plants in ad for Grape-Nut cereal); *AMF, Inc.*, 95 FTC 310 (1980) (ad showed children riding bicycles in unsafe manner). The cases were consent settlements and were never litigated. Cases in which advertisements depict usage of a product in an unsafe or inappropriate manner have occurred infrequently in the past, and this is an area in which the Committee hopes that there will be continued cooperation between the Commission and industry.

SECTION 12.—REPORT

This section requires the Commission to submit a detailed report, twice a year during fiscal years 1988, 1989, and 1990 on its enforcement of the law against resale price maintenance.

Since 1911, resale price maintenance—the fixing of retail prices by manufacturers—has been deemed by the courts to be a per se violation of the antitrust laws. Congress affirmed this view when it repealed authorization for State Fair Trade laws in 1975, and expressed its intent to reapply the *per se* rule across the country.

Notwithstanding this clear history of the law, some members of the FTC have expressed their disapproval of the *per se* rule. As the Committee learned in the course of its hearings, this view has been reflected in a reduction in the FTC's law enforcement activity in this area.

The Committee is concerned about the lack of the enforcement in this area. The current prohibition of resale price maintenance is intended to protect both consumers—who seek low retail prices—and retailers, who seek the right to compete. In exercise of its oversight powers, the Committee consequently has mandated that the FTC forward detailed information about its activities in this area. Such information may serve as a basis for other appropriate legislative action.

SECTION 13.—CONGRESSIONAL REVIEW OF RULES

This section would add a new section to the FTC Act providing for congressional review of FTC trade regulation rules. Under this provision, the FTC would submit final rules to Congress for consideration during a period of 90 days of continuous session of Congress. At the end of such 90-day period, a rule would become effective in accordance with its terms unless a joint resolution disapproving the rule has been enacted into law.

The Federal Trade Commission Improvements Act of 1980 contained a temporary legislative veto provision, but it was declared unconstituional in 1983 by the Supreme Court.[29] The Committee believes that the revised legislative review provision contained in section 13 meets constitutional requirements.

SECTION 14.—PREDATORY PRICING

This section requires the FTC to report twice yearly during the life of the authorization to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce regarding its enforcement activity relating to predatory pricing. The section specifies items to be included in the report, such as complaints made to the FTC, investigations opened, and other actions taken. The report is also to include any evaluation obtained by the FTC concerning the potential impacts of predatory pricing upon businesses (including small businesses). The section states that the report should not reveal the identity of persons or companies complained about or those subject to investigation that have not otherwise been made public.

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[29] *U.S. House of Representatives* v. *FTC.*, 51 U.S.L.W. 3935 (June 28, 1983); *Immigration and Naturalization Service* v. *Chadha*, 103 S. Ct. 2764 (1983).

SECTION 15.—INTERVENTION BY THE FTC IN CERTAIN PROCEEDINGS

Section 15(a) would prohibit the expenditure of funds, during the period of this authorization, "for the purpose of submitting statements to, appearing before, or intervening in the proceedings of, any Federal or State agency" unless the FTC advises the specified Senate and House Committees of such action. The Committee understands that time is often of the essence when the FTC submits its comments to other governmental entities. By this provision the Committee does not intend to impose unduly restrictive administrative requirements on the FTC. Therefore, the Committee believes that the FTC would be in compliance with this provision if it provides notice to the specified Senate and House Committees as soon as the Commission receives notice of a staff recommendation to authorize or make an appearance or submit a statement or intervene in a proceeding.

The FTC should apprise the Committee through its budget submissions of resources allocated to intervention activity.

SECTION 16.—NATIVE AMERICAN ARTS AND CRAFTS

This section requires the FTC to investigate the marketing of imitation Native American arts, crafts and jewelry.

Imitation American Indian arts and crafts are manufactured in Mexico, Taiwan, the Philippines, and other unidentified countries, and imported into the United States with removable adhesive labels and string tags designated the country of origin.

The Committee is disturbed by a pattern of intentional consumer deception with regard to some importers and dealers in imitation Indian arts and crafts. Practices indicating such a pattern include the removal of country-of-origin tags from imitation Native American arts and crafts, establishment of stores in areas known for Native American arts and crafts, advertising in publications concerning Native American arts and crafts, and representations implying that imitation products are authentic.

Such practices deceive consumers, discourage the purchase of Native American arts and crafts, and unfairly compete with Native American artists. These practices are particularly harmful to the livelihoods of thousands of American Indians residing in Arizona and New Mexico, including Navajo, Hopi, Zuni, and Rio Grande Pueblo Indians. Through their production of authentic arts and crafts, these and many other Native American peoples are able to keep alive languages, traditions, and customs that contribute to the fabric of a uniquely American culture. It is imperative that the full protection of the Federal Trade Commission Act be extended to this important industry.

SECTION 17.—FUNDING FOR REGIONAL OFFICES

This section provides that the FTC redirect $858,000 to its regional offices for each of fiscal years 1988, 1989, and 1990. At least $500,000 must come from the Economic Activities Mission and the Office of Policy Development. The remainder cannot be redirected from amounts made available for law enforcement activities. For fiscal years 1988, 1989, and 1990, regional offices must be maintained at the locations, and at not less than the proposed budget

submission to Congress, for the regional offices for fiscal year 1988, in addition to the $858,000 provided by this section.

Since 1981, both funding resources and workyear allocations for the regional offices have decreased appreciably. Workyear reductions by operational unit from fiscal year 1981 through fiscal year 1987 reflect a disproportionate reduction of 57 percent incurred by the regional offices, as compared to a 29 percent reduction for the rest of the agency. Despite the amount of the FTC budget devoted to the regions, the enforcement activities of the regional offices have been disproportionately large. Historically, FTC regional offices have been the most productive law enforcement division within the agency. In almost every area of enforcement activity, preliminary information on regional offices suggests that regional offices handled a sizeable percentage of activity including consumer protection and competition investigations and pending litigation as compared to Headquarters.

The issue of reduction of the regional offices was addressed by members of the Senate and House Appropriations Committees in 1982 when an agreement was reached to maintain the size of each regional office at 18 workyears, on an annualized basis or the existing level, whichever was less. On February 24, 1983, all offices were at 18 workyears or above, with the exception of the Boston office at 16, and the Denver office at 9. Denver and Boston, the two exceptions, were to be maintained at their 1983 levels. This agreement was reached to negate a decision by the FTC to close some regional offices. This section is intended to increase the regional office funding levels and bring them closer to the minimal workyear levels of the agreement.

The regional offices are fundamentally important to the FTC's law enforcement mission. Because of the regional offices, the FTC is able to maintain an effective presence with the business community, consumers, and other Federal, State, and local agencies. The regional office viability is assured by allowing sufficient resources to cover an entire region, maintain law enforcement contacts at credible levels, conduct resource intensive cases, and obtain voluntary compliance with FTC-enforced laws.

In the judgment of the Committee, law enforcement activity in the regional offices is a priority over the research conducted within the FTC's Economic Activities Mission and its Office of Policy Development. In 1983, the President's survey on cost control in government, the Grace Commission Report, made several findings with regard to the Economic Activities Mission. Among its findings, it concluded that research does not directly contribute to the primary function of the FTC, the prosecution of unlawful business activities. It also concluded that research performed by the FTC is to a large extent based upon publicly available information and should be performed in academia and the private sector.[30] To the extent that the Economic Activities Mission and the Office of Policy Development are engaging in activities or research of a policy planning nature that do not directly relate to the law en-

[30] *Grace Commission Report*, vol. I, sec. 2 at 6 (May 26, 1983).

forcement mission of the agency, the Committee believes that the regional office activity is a priority.

SECTION 18.—AUTHORIZATION OF APPROPRIATION

This section would reauthorize the FTC for 3 years at funding levels of $69,850,000 for fiscal year 1988, $70,850,000 for fiscal year 1989, and $71,850,000 for fiscal year 1990. For fiscal years 1989 and 1990, such additional amounts are also authorized as may be necessary for increases in salary, pay, and other employee benefits authorized by law.

SECTION 19.—EFFECTIVE DATE

This section states that, unless otherwise provided, provisions of this legislation become effective on the date of enactment. The amendment made by section 2 of this legislation, which pertains to the FTC's "unfair methods of competition" authority, applies only with respect to cease-and-desist orders issued under section 5 of the FTC Act (15 U.S.C. 45) after the date of enactment. Section 6, pertaining to prevalence and unlawful acts or practices, and section 11, pertaining to the unfairness standard for commercial advertising, apply only to rulemaking proceedings initiated after the date of enactment. Section 7, which pertains to the effective date of cease-and-desist orders, and section 9 of this legislation, which defines "unfair acts or practices", apply only with respect to cease-and-desist orders issued under section 5 of the FTC Act (15 U.S.C. 45), or to rules promulgated under section 18 of the FTC Act (15 U.S.C. 57a), after the date of enactment. Section 8 of the legislation, which pertains to the application of civil investigative demand procedures to all FTC law enforcement investigations, applies only to compulsory process issued after the date of enactment.

AGENCY COMMENTS

FEDERAL TRADE COMMISSION
Washington, DC, March 9, 1987.

Hon. ALBERT GORE, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR CHAIRMAN GORE: The Commission understands that on Tuesday, March 10, 1987, the Senate Committee on Commerce, Science and Transportation is scheduled to mark up a bill to authorize the Federal Trade Commission through Fiscal Year 1990. We further understand that the bill in question, sponsored by you, Chairman Hollings and Senators Danforth, Breaux, McCain and Kasten, among other things, includes a provision concerning the staffing of the Commission's regional offices that was not included in the authorization bills from the previous Congress that formed the basis for the Commission's testimony before your Subcommittee in February, 1987.

The provision, if enacted, would require the Commission to redirect up to $858,000 from the Economic Activities Mission and the Office of Policy Development to the regional offices. As we did not have an opportunity to consider this proposed provision in the

course of our hearings on February 4, we would welcome an opportunity to present our views about it to you either orally or in writing. The Commission is within 30 days of completing a study concerning the resources that should be committed to our regional offices, and we would be glad to discuss that subject with you. In addition, we would appreciate being able to discuss with you the most appropriate sources within the Commission for any transfers of resources that might be shifted to the regions. For now, however, we simply ask that you express our concern to the Committee during its mark-up session that the amount of resources Section 17 proposes to shift to the regions may or may not be the optimal amount and drawing these resources from the sources proposed may be damaging to our efforts to meet our statutory responsibilities.

By direction of the Commission.

DANIEL OLIVER, *Chairman.*

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE FEDERAL TRADE COMMISSION ACT

Section 5 of that Act

SEC. 5. (a)(1) * * *

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) * * *

(b)–(f) * * *

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

[(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or]

(2) Upon the sixtieth day after such order is served, if a petition for review has been duly filed, except that any such order

may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the thirty-day period beginning on the date of the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending; or

[(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or]

(3) For purposes of section 19(a)(2) and section 5(m)(1)(B), if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of thirty days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed; or

[(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.]

(4) In the case of an order requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of thirty days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h)–(1) * * *

(m)(1)(A) * * *

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a

final cease and desist order, *other than a consent order,* with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) * * *

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. *Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).*

(3) * * *

(n) The Commission shall not have any authority to find a method of competition to be an unfair method of competition under subsection (a)(1) if, in any action under the Sherman Act, such method of competition would be held to constitute State action.

(o) The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

Section 6 of that Act

SEC. 6. The commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

(b) To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respec-

tively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports, or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c)–(h) * * *

Provided, That the exception of "banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers from, any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking, in business as a savings and loan institution, *in business as a Federal credit union,* or in business as a common carrier subject to the Act to regulate commerce.

* * * * * * *

Section 18 of that Act

SEC. 18. (a)(1) Except as provided in [subsection (i)] *subsection (h)*, the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) * * *

(b)(1)–(2) * * *

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are

prevalent under this paragraph only if it has issued cease and desist orders regarding such acts or practices, or any other information available to the Commission indicates a pattern of unfair or deceptive acts or practices.

(c)–(e) * * *

(f)(1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks, or savings and loan institutions described in paragraph (3) each agency specified in paragraph (2) or (3) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks or savings and loan institutions described in paragraph (3) subject to its jurisdiction. The Board of Governors of the Federal Reserve System (with respect to banks) and the Federal Home Loan Bank Board (with respect to savings and loan institutions described in paragraph (3)) *and the National Credit Union Administration Board (with respect to Federal credit unions described in paragraph (4))* shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a)(1)(B) of this section, then within 60 days after such rule takes effect each such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks or savings and loan institutions described in paragraph (3), *or Federal credit unions described in paragraph (4),* as the case may be, which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless (A) **[**either such**]** *any such* Board finds that such acts or practices of banks or savings and loan institutions described in paragraph (3), *or Federal credit unions described in paragraph (4),* as the case may be, are not unfair or deceptive, or (B) the Board of Governors of the Federal Reserve System finds that implementation of similar regulations with respect to banks, *savings and loan institutions or Federal credit unions* would seriously conflict with essential monetary and payments systems policies of such Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

(2)–(3) * * *

(4) Compliance with regulations prescribed under this subsection shall be enforced with respect to Federal credit unions under sections 120 and 206 of the Federal Credit Union Act (12 U.S.C. 1766 and 1786).

[(4)**]***(5)* For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

[(5)] *(6)* The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

[(6)] *(7)* Each agency exercising authority under this subsection shall transmit to the Congress each year a detailed report on its activities under this paragraph during the preceding calendar year.

(g) * * *

[(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding udner this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral persentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

[(2) The Commission shall reserve an amount equal to 25 percent of the amount appropriated for the payment of compensation under this subsection for any fiscal year for use in accordance with this paragraph. Such reserve amounts shall be available solely for the payment of compensation to persons who either (A) would be regulated by the proposed rule involved; or (B) represent persons who would be so regulated. Any portion of such reserve amount which is not used for the payment of compensation to such persons under this paragraph shall revert to the Treasury of the United States.

[(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000.

[(4) The commission, in connection with the administration of this subsection pursuant to rules prescribed by the Commission under paragraph (1), shall establish a small business outreach program. Such program shall—

> [(A) solicit public comment from small businesses whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and
>
> [(B) encourage the participation of small businesses in the compensation program administered by the Commission under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensaton under such program.]

[(i) *(h)* The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 or in an substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce. *The Commission shall have no authority under this section to initiate any new rulemaking proceeding which intended to or may result in the promulgation of any rule by the Commission which prohibits*

or otherwise regulates and commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act of practice in or affecting commerce.

[(j)] *(i)*1) For purposes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commissioner; or (C) any person who has entered into a contract or any other agreement or arrangement with the Commissioner to provide any goods or services (including consulting services) to the Commission.

(2) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment of the Commission shall promulgate a final rule, which shall authorize the Commission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and

(B) a verbatim record or a summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.

[(k)] *(j)* Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission, from communicating or causing to be communicated to any Commission or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

Section 20 of that Act

SEC. 20. (a) For purposes of this section:

(1) The terms "civil investigative demand" and "demand" mean any demand issued by the Commission under subsection (c)(1).

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(3) The term "Commission investigator" means any attorney or investigator employed by the Commission who is charged

with the duty of enforcing or carrying into effect any provisions relating to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)] *acts or practices or methods of competition declared unlawful by a law administered by the Commission.*

(4) The term "custodian" means the custodian or any deputy custodian designated under section 21(b)(2)(A).

(5) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(6) The term "person" means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.

(7) The term "violation" means any act or omission constituting an [unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1))] *acts or practice or method of competition declared unlawful by a law administered by the Commission.*

(b) For the purpose of investigations performed pursuant to this section with respect to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] any *act or practice or method of competition declared unlawful by a law administered by the Commission* all actions of Commission taken under section 6 and section 9 shall be conducted pursuant to subsection (c).

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] any *act or practice or method of competition declared unlawful by a law administered by the Commission,* the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answer, or testimony.

(2)–(12) * * *

(d)–(i) * * *

(j) the provisions of this section shall not—

(1) apply to any proceeding under section 5(b), *any proceeding under section 11(b) of the Clayton Act, or any adjudicative proceeding under any other provision of law;* or

(2) apply to or affect the jurisdiction, duties, or powers of any agency of the Federal Government, other than the Commission, regardless of whether such jurisdiction, duties, or powers are derived in whole or in part, by reference to this Act.

Section 23 of that Act

SEC. 23. * * *

SEC. 24. (a) The Commission shall not have any authority to conduct any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Act entitled "An Act to authorize association of producers of agricultural products", approved February 18, 1922 (7 U.S.C. 291 et seq., commonly known as the Capper-Volstead Act), is not a violation of any of the antitrust Acts or this Act.

(b) The Commission shall not have any authority to conduct any study or investigation of any agricultural marketing orders.

SEC. 25. (a) For purposes of this section, the term—

(1) "joint resolution" means a joint resolution the matter after the resolving clause of which is as follows: "That the final rule promulgated by the Federal Trade Commission dealing with the matter of , which final rule was submitted to Congress on is disapproved.", the first blank being filled with the subject of the rule and such further description as many be necessary to identify it, and the second blank being filled with the date of submittal of the rule to the Congress; and

(2) "rule" means any rule promulgated by the Commission pursuant to this Act other than a rule promulgated under section 18(a)(1)(A).

(b) The Commission, after promulgating a final rule, shall submit such final rule to the Congress for review in accordance with this section. Such final rule shall be delivered to each House of the Congress on the same day and to each House of Congress while it is in session.

(c) Any final rule of the Commission shall become effective in accordance with its terms unless before the end of the period of ninety days of continuous session of Congress after the date such final rule is submitted to the Congress a joint resolution disapproving such final rule is enacted into law.

(d)(1) If a final rule of the Commission is disapproved in accordance with this section, the Commission may promulgate another final rule which relates to the same acts or practices as the rule which was disapproved. Such other final rule—

(A) shall be based upon—

(i) the rulemaking record of the disapproved final rule; or

(ii) such rulemaking record and any record established in supplemental rulemaking proceedings conducted by the Commission; and

(B) may contain such changes as the Commission considers necessary or appropriate.

Supplemental rulemaking proceedings referred to in subparagraph (A)(ii) of this paragraph may be conducted in accordance with section 553 of title 5, United States Code, if the Commission determines that it is necessary to supplement the existing rulemaking record.

(2) The Commission, after promulgating a final rule under this subsection, shall submit the final rule to Congress in accordance with subsection (a) of this section.

(e) Congressional inaction on a joint resolution disapproving a final rule of the Commission shall not be construed—

(1) as an expression of approval of such rule, or

(2) as creating any presumption of validity with respect to such rule.

(f)(1)(A) For purposes of subsection (c) of this section, continuity of session is broken only by an adjournment sine die at the end of the second regular session of a Congress.

(B) The days on which either House of Congress is not in session because of an adjournment of more than five days to a day certain are excluded in the computation of the period specified in subsection (c) of this section.

(2)(A) In any case in which a final rule of the Commission is prevented from becoming effective by an adjournment sine die at the end of the second regular session of the Congress before the expiration of the period specified in subsection (c) of this section, the Commission shall resubmit such rule at the beginning of the first regular session of the next Congress.

(B) The period specified in subsection (c) of this section shall begin on the date of a resubmission under subparagraph (A) of this paragraph.

Section 24 of that Act

SEC. [24.] *26.* There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $42,000,000 for the fiscal year ending June 30, 1975; not to exceed $47,091,000 for the fiscal year ending June 30, 1976; not to exceed $50,000,000 for the fiscal year ending in 1977; not to exceed $70,000,000 for the fiscal year ending September 30, 1980; not to exceed $75,000,000 for the fiscal year ending September 30, 1981; [and] not to exceed $80,000,000 for the fiscal year ending September 30, 1982 *; not to exceed $69,850,000 for the fiscal year ending September 30, 1988; not to exceed $70,850,000 for the fiscal year ending September 30, 1989; and not to exceed $71,850,000 for the fiscal year ending September 30, 1990, and such additional sums for the fiscal years ending September 30, 1989 and September 30, 1990, as may be necessary for increases in salary, pay, and other employee benefits as authorized by law.*

Section 25 of that Act

SEC. [25.] *27.* This Act may be cited as the "Federal Trade Commission Act".

THE FEDERAL TRADE COMMISSION IMPROVEMENTS ACT OF 1980

Section 21 of that Act

CONGRESSIONAL REVIEW OF RULES

[SEC. 21. (a)(1) The Federal Commission, after promulgating a final rule, shall submit final rule to the Congress for review in accordance with this section. Such final rule shall be delivered to each House of the Congress on the same date and to each House of the Congress while it is in session. Such final rule shall be referred to the Committee on Commerce, Science, and Transporation of the Senate and to the Committee on Interstate and Foreign Commerce of the House, respectively.

[(2) Any such final rule shall become effective in accordance with its terms unless, before the end of the period of 90 calendar days of continuous session after the date such final rule is submitted to the Congress, both Houses of the Congress adopt a concurrent resolution disapproving such final rule.

[(b)(1) The provisions of this subsection are enacted by the Congress—

[(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of concurrent resolutions which are subject to this section, and such provisions supersede other rules only to the extent that they are inconsistent with such other rules; and

[(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House

[(2)(A) Any concurrent resolution disapproving a final rule of the Commission shall, upon introduction or receipt from the other House of the Congress, be referred immediately by the presiding officer of such House to the Committee on Commerce, Science, and Transportation of the Senate or to the Committee on Interstate and Foreign Commerce of the House, as the case may be.

[(B) If a committee to which a concurrent resolution is referred does not report such concurrent resolution before the end of the period of 75 calendar days of continuous session of the Congress after the referral of such resolution to the Committee on Commerce, Science, and Transportation of the Senate or to the Committee on Interstate and Foreign Commerce of the House, as the case may be, under subsection (a)(1), it shall be in order to move to discharge any such committee from further consideration of such concurrent resolution.

[(C)(i) A motion to discharge in the Senate may be made only by a Member favoring the concurrent resolution, shall be privileged (except that it may not be made after the committee has reported a concurrent resolution with respect to the same final rule of the Commission), and debate on such motion shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the motion. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other concurrent resolution with respect to the same final rule of the Commission.

[(ii) A motion to discharge in the House may be made by presentation in writing to the Clerk. The motion may be called up only if the motion has been signed by one-fifth of the Members of the House. The motion is highly privileged (except that it may not be made after the committee has reported a concurrent resolution of disapproval with respect to the same rule). Debate on such motion shall be limited to not more than 1 hour, the time to be divided

equally between those favoring and those opposing the motion. An amendment to the motion is not order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

[(3)(A) When a committee has reported, or has been discharged from further consideration of, a concurrent resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the concurrent resolution. The motion shall be privileged in the Senate and highly privileged in the House of Representatives, and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

[(B) Debate on the concurrent resolution shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such concurrent resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the concurrent resolution shall not be in order, and it shall not be in order to move to consider the vote by which such concurrent resolution was agreed to or disagreed to.

[(4) Appeals from the decision of the Chair relating to the application of the rules of the Senator or the House of Representatives, as the case may be, to the procedure relating to a concurrent resolution shall be decided without debate.

[(5) Notwithstanding any other provision of this subsection, if House has approved a concurrent resolution with respect to any final rule of the Commission, then it shall not be in order to consider in such House any other concurrent resolution with respect to the same final rule.

[(c)(1) If a final rule of the Commission is disapproved by the Congress under subsection (a)(2), then the Commission may promulgate a final rule which relates to the same acts or practices as the final rule disapproved by the Congress in accordance with this subsection. Such final rule—

[(A) shall be based upon—

[(i) the rulemaking record of the final rule disapproved by the Congress; or

[(ii) such rulemaking record and the record established in supplemental rulemaking proceedings conducted by the Commission in accordance with section 553 of title 5, United States Code, in any case in which the Commission determines that it is necessary to supplement the existing rulemaking record; and

[(B) may contain such changes as the Commission considers necessary or appropriate.

[(2) The Commission, after promulgating a final rule under this subsection, shall submit the final rule to the Congress in accordance with subsection (a)(1).

[(d) Congressional inaction on, or rejection of, a concurrent resolution of disapproval under this section shall not be construed as an expression of approval of the final rule involved, and shall not be construed to create any presumption of validity with respect to such final rule.

[(e)(1) The Comptroller General shall prepare a report which examines the review of Commission rules under this section. Such report shall—

[(A) list the final rules submitted to the Congress by the Commission during the period in which this section is in effect;

[(B) list the final rules disapproved by the Congress under subsection (a)(2);

[(C) specify the number of instances in which the Commission promulgates a final rule in accordance with subsection (c); and

[(D) include an analysis of any impact which the provisions of this section have had upon the decisionmaking and rulemaking processes of the Commission.

[(2) The Comptroller General shall submit the report required in paragraph (1) to the Congress before the end of fiscal year 1982.

[(f)(1) Any interested party may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this section. The district court immediately shall certify all questions of the constitutionality of this section to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[(2) Notwithstanding any other provision of law, any decision on a matter certified under paragraph (1) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought not later than 20 days after the decision of the court of appeals.

[(3) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under paragraph (1).

[(g)(1) For purposes of this section—

[(A) continuity of session is broken only by an adjournment sine die; and

[(B) days on which either House is not in session because of an adjournment of more than 5 days to a day certain are excluded in the computation of the periods specified in subsection (a)(2) and subsection (b).

[(2) If an adjournment sine die of the Congress occurs after the Commission has submitted a final rule under subsection (a)(1), but such adjournment occurs—

[(A) before the end of the period specified in subsection (a)(2); and

[(B) before any action necessary to disapprove the final rule is completed under subsection (a)(2);

then the Commission shall be required to resubmit the final rule involved at the beginning of the next regular session of the Congress. The period specified in subsection (a)(2) shall begin on the date of such resubmission.

[(h) For purpose of this section:

[(1) The term "Commission" means the Federal Trade Commission.

[(2) The term "concurrent resolution" means a concurrent resolution the matter after the resolving clause of which is as

follows: "That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of ————————, which final rule was submitted to the Congress on ————————,". (The blank spaces shall be filled appropriately.)

[(3) The term "rule" means any rule promulgated by the Commission pursuant to the Federal Trade Commission Act (15 U.S.C. 41 et seq.), other than any rule promulgated under section 18(a)(1)(A) of such Act (15 U.S.C. 57a(a)(1)(A)).

[(i) The provisions of this section shall take effect on the date of the enactment of this Act and shall cease to have any force or effect after September 30, 1982.]

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